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8 Attorneys for Protestants
9 CITY OF BRENTWOOD

10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 In the matter of Hearing re California
12 WaterFix Petition for Change

**CITY OF BRENTWOOD'S RESPONSE TO
13 OBJECTIONS TO WRITTEN
14 TESTIMONY AND EXHIBITS**

15 **I. INTRODUCTION**

16 The objections to the testimony and exhibits offered by the City of Brentwood that are
17 raised in San Luis & Delta-Mendota Water Authority's Objections to Part 1B Parties' Cases in
18 Chief ("SLDMWA Objection") and the Department of Water Resources' Objections to
19 Testimony and Exhibits Submitted by City of Brentwood (Group 10) and Motion to Strike
20 ("DWR Objection") are without merit. As that testimony is relevant, reliable, and plainly
21 admissible, the City of Brentwood respectfully requests that the SWRCB overrule the objections
22 in their entirety and deny SLDMWA and DWR's accompanying requests to exclude this
23 evidence.

24 **II. PROCEDURAL BACKGROUND**

25 Water Code section 1702 requires that when a petition for change is filed, the petitioner
26 must establish that the change will not operate to the injury of any legal user of the water
27 involved. Consistent with that requirement, Part 1 of this hearing addresses two questions: (1)
28 whether the proposed changes would in effect initiate a new water right, and (2) whether the
proposed changes would cause injury to any municipal, industrial or agricultural uses of water,

1 including associated legal users of water. (October 30, 2015 Notice of Hearing (“Notice”), p. 11.)

2 On September 1, 2016, Protestants submitted written testimony and exhibits in opposition
3 to the Petition. The City of Brentwood submitted the expert testimony and exhibits of Susan
4 Paulsen and Chris Ehlers. SLDMWA objected to one statement in Dr. Paulsen’s testimony as
5 hearsay. DWR objected on foundation grounds to certain statements by Mr. Ehlers regarding
6 financial injury, and on the grounds that the exhibits presented by the City amounted to
7 impermissible surprise testimony.¹ For the reasons outlined below, these objections are without
8 merit, and should be overruled.

9 **III. ARGUMENT**

10 Evidence in a hearing on a petition for change is admitted in accordance with Government
11 Code § 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Under Government Code section 11513(c),
12 relevant evidence must be admitted if “it is the sort of evidence on which responsible persons are
13 accustomed to rely in the conduct of serious affairs, regardless of the existence of any common
14 law or statutory rule which might make improper the admission of the evidence over objection in
15 civil actions.” (Gov. Code § 11513(c).) The Board has recognized that this standard is generally
16 more permissive than the one imposed in civil actions, observing that “hearing officers generally
17 prefer to admit evidence that would be admissible under the State Water Board’s regulations,
18 using the more liberal standards applicable to administrative proceedings.” (Ruling on Joint
19 Objections to Truckee-Carson Irrigation District’s Exhibits in the Truckee River Hearing (Aug.
20 11, 2010) at p. 1.) The testimony of Dr. Paulsen and Mr. Ehlers testimony is both relevant and
21 reliable, and would be admissible in any civil action. The same result applies here, and so the
22 City of Brentwood respectfully requests that the SWRCB overrule the objections in their entirety.

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26 ¹ The City of Brentwood reiterates and incorporates the arguments set out in its September 30, 2016 Response to
27 Objection Filed by DWR and Joinder in SVWU Response to Master Objection. If DWR intended to incorporate its
28 Master Objections into this individual objection to the City of Brentwood’s testimony, those objections should be
overruled for all of the reasons stated in the Sacramento Valley Water Users’ Response to Department of Water
Resources’ Master Objections.

1 **A. Testimony on Financial Injury is Relevant to Part 1B**

2 Evidence that is relevant and reliable is admissible in an administrative hearing. (*Aengst*
3 *v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) DWR objects to Mr.
4 Ehler's statements regarding the potential financial impact of water quality changes associated
5 with the petitioned Project for the City's water delivery operations, on the grounds that this
6 testimony is irrelevant to legal injury of water users. (DWR Objection, at 2:25-3:7). The
7 SWRCB's October 7 Ruling addressed this issue, stating that the SWRCB "will permit testimony
8 concerning the potential, indirect economic impacts attributable to the proposed changes in point
9 of diversion, such as testimony concerning any costs attributable to any impacts to water quality
10 that may be caused by the proposed changes." (Oct. 7, 2016 Ruling, p. 3.) Mr. Ehlers testimony
11 speaks directly to this point, and is therefore relevant to Part 1 issues as identified by the
12 SWRCB.

13 **B. Mr. Ehler's Testimony is Based upon Proper Foundation.**

14 DWR objects to Mr. Ehlers' testimony regarding potential financial injury to the City of
15 Brentwood, in light of the City's wastewater treatment program and its existing contractual
16 arrangement with East Contra Costa Irrigation District, as lacking in foundation, irrelevant, and
17 speculative. (DWR Objection, 2:25-3:23). Mr. Ehlers establishes his foundation for testifying on
18 these issues, and the matters upon which his opinion is based, in paragraphs 1 through 9 of his
19 testimony. In those paragraphs, Mr. Ehlers explains his role as the Assistant Director of Public
20 Works, including his oversight of water and wastewater operations; his licensing for Water
21 Treatment and Water Distribution; and his 23 years of experience in this field. (Brentwood-001, ¶
22 1-2.) He goes on to explain the legal and practical framework governing the water quality
23 operations that he oversees. (*Id.*, ¶¶ 7-9.) The remainder of Mr. Ehlers' testimony applies that
24 significant experience and knowledge to the specific questions before the SWRCB in Part 1.

25 Mr. Ehlers is entitled to offer opinions that are rationally based on his own perceptions
26 and observations; and helpful to a clear understanding of his testimony. (Evid. Code, § 801.)
27 This rule ensures that an expert "whether basing testimony upon professional studies or personal
28 experience, employs in the courtroom the same level of intellectual rigor that characterizes the

1 practice of an expert in the relevant field.” (*Sargon Enterprises, Inc. v. University of Southern*
 2 *California*, (2012) 55 Cal. 4th 747, 772.) The “matter” forming the basis of an expert’s opinion
 3 may include facts, data and intangibles such as the expert’s knowledge and experience. (*People v.*
 4 *Parnell* (1993) 16 Cal.App.4th 862, 868-869.) Mr. Ehler’s observations regarding the potential
 5 impacts to the City, financial and otherwise, are grounded in his significant experience in this
 6 field, and his familiarity with the framework in which his job functions are performed. This is
 7 ample foundation for the observations offered.

8 **C. The Brentwood Exhibits are Admissible Evidence**

9 DWR argues that Brentwood exhibits Brentwood-101 through Brentwood-117 are
 10 irrelevant and lack foundation because they were not introduced or authenticated prior to their
 11 introduction as evidence. The SWRCB hearing procedures require a witness to affirm that her
 12 written testimony is “true and correct” upon appearing at the hearing to testify (Cal. Code Regs.,
 13 tit. 23, § 648.4(d)). That rule does not require witness authentication of exhibits prior to
 14 admission, and so these arguments are premature, at best. These exhibits include Dr. Paulsen’s
 15 professional resume, technical studies, and reports (many of which were prepared by DWR staff).
 16 Each of these exhibits is the type of relevant and reliable document upon which a responsible
 17 person might rely, and is therefore admissible in this proceeding. (Gov. Code § 11513(c); see
 18 also Evid. Code, § 801(b) (An expert is entitled to base her opinion upon technical reports and
 19 scientific literature, provided such matter is “of a type that reasonably may be relied upon by an
 20 expert in forming an opinion upon the subject to which his testimony relates.”).)

21 **D. Dr. Paulsen’s Reference to Reports She Prepared Does Not Constitute**
 22 **Hearsay**

23 SLDMWA objects to a single statement in Dr. Paulsen’s testimony: “Additional details of
 24 my opinions are provided in the report entitled, ‘Report on Effects of the Proposed California
 25 WaterFix Project on Water Quality at the City of Brentwood,’ (Exhibit Brentwood-102).”
 26 (SLWDMA Objection, at 15:23-16:4.) Dr. Paulsen’s reference to a self-authored report attached
 27 as an exhibit to her testimony do not amount to hearsay under even strictest interpretation of that
 28 rule, and so these statements are clearly admissible. Under Evidence Code section 1200, hearsay

1 is a statement made other than by a witness while testifying at the hearing. Here, the exhibit is
 2 directly attached as a component of Mr. Paulsen’s written testimony. Statements of a witness
 3 explaining her interpretation of an exhibit which is also offered as evidence are not hearsay. (See,
 4 e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 608 (“Neither the hearsay rule nor its exceptions are
 5 concerned with the credibility of witnesses who testify directly to the jury.”).) In fact, “Evidence
 6 Code section 802 properly allows an expert to relate generally the kind and source of the “matter”
 7 upon which his opinion rests.” (*People v. Sanchez*, (2016) 63 Cal.4th 665, 685-686.) Evidence
 8 Code section 802 goes so far as to allow the expert to read excerpts of that supporting material,
 9 “when context is needed to understand what has transpired.” (*Notrica v. State Compensation*
 10 *Insurance Fund* (1999) 70 Cal.App.4th 911, 933.)

11 The SWRCB ordered that direct testimony in this hearing be submitted in writing.
 12 (Notice, Enclosure D, p. 33) The exhibits attached to Dr. Paulsen’s written statement are part of
 13 that testimony, and so are not hearsay. SLDMWA’s hearsay objection should be overruled.

14 **IV. SPECIFIC RESPONSES**

15 The City of Brentwood offers the following responses to the specific portions of testimony
 16 that SLDMWA and DWR have objected to:

<p>18 <u>Testimony Objected to:</u> Ehlers Testimony, Brentwood-001, at ¶¶ 7- 19 9, 11-14, alleging financial injuries.</p> <p>20 <u>DWR’s Objection:</u> Highly speculative, lacks foundation, misleading, and 21 irrelevant.</p>	<p>18 <u>Brentwood Response to Objection:</u> DWR does not explain how or why Mr. Ehler’s testimony is speculative or lacks foundation.</p> <p>20 To the extent DWR asserts any claims of financial impacts caused by WaterFix are speculative and irrelevant, the SWRCB has determined that “testimony concerning the potential, indirect economic impacts attributable to the proposed changes in point of diversion” are admissible and relevant for Part 1B. (October 7 Ruling, p. 3.)</p>
<p>25 <u>Testimony Objected to:</u> Brentwood-104 (RDEIR/SDEIS comment letter submitted by the City of Brentwood on October 27, 26 2015)</p>	<p>25 <u>Brentwood Response to Objection:</u> DWR objects to the introduction of this comment letter as surprise testimony because “it is impossible to determine exactly which parts of the incorporated testimony the witness actually intends to use as direct 27</p>

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<p><u>DWR's Objection:</u> Surprise testimony, Lack of Foundation.</p>	<p>testimony, and what additional conclusions are made for purposes of this hearing.”</p> <p>This letter was introduced as evidence on June 21, 2016, as part of exhibit SWRCB-3. The contents of this public comment letter are of no surprise to DWR because the letter was sent to DWR in October 2015, the letter was included in the list of SWRCB staff exhibits, and the bar against surprise testimony does not require parties to explain their legal conclusions regarding the hearing issues in order to introduce relevant evidence.</p>
<p><u>Testimony Objected to:</u></p> <ul style="list-style-type: none"> • Brentwood-101 (Curriculum Vitae of Susan Paulsen) • Brentwood-102 (Exponent Technical Report, authored by Dr. Paulsen) • Brentwood-103 (SWRCB 2015 Notice of Petition) • Brentwood-104 (RDEIR/SDEIS comment letter submitted by the City of Brentwood on October 27, 2015) • Brentwood-105 (DSM2 Recalibration: Prepared for the California Department of Water Resources, CH2MHill 2009) • Brentwood-106 (Historic water year type classifications for the Sacramento and San Joaquin River Valleys) • Brentwood-107 (<i>Organic matter sources and rehabilitation of the Sacramento-San Joaquin Delta (California, USA)</i>, Jassby, A.D. and J.E. Cloern, 2000) • Brentwood-108 (<i>California Water Plan Update 2005</i>, Volume 3, Chapter 12 Sacramento-San Joaquin Delta Region, DWR, 2005) • Brentwood-109 (<i>California Water Plan Update 2009</i>, Volume 3 Regional Reports, Sacramento-San Joaquin River Delta, Integrated Water Management, Bulletin 160-09, DWR, 2009) • Brentwood-110 (<i>Delta Water Facilities, Program for: Delta Protection and Water Transfer, Water Conservation, Water Recycling, Surface and Groundwater Storage</i>, Bulletin 76, DWR 1978) • Brentwood-111 (<i>Long-Term Trends of Delta Residence Time</i>, Mierzwa, M., J. Wilde, and B. Suits 2006a) • Brentwood-112 (Methodology for Flow and Salinity Estimates in the 	<p><u>Brentwood Response to Objection:</u></p> <p>The SWRCB hearing procedures require a witness to affirm that her written testimony is “true and correct” upon appearing at the hearing to testify (Cal. Code Regs., tit. 23, § 648.4(d)). That rule does not require witness authentication of exhibits prior to admission, and so these arguments are premature at best.</p>

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<p>Sacramento-San Joaquin Delta and Suisun Marsh, <i>Chapter 3: Developing a Residence Time Index to Study Changes in 1990-2004 Delta Circulation Patterns</i>, M. Mierzwa, J. Wilde, B. Suits, and T. Sommer. 2006b)</p> <ul style="list-style-type: none"> • Brentwood-113 (<i>Using Particle Tracking to Indicate Delta Residence Time</i>, J. Wilde, M. Mierzwa, and B. Suits. 2006c) • Brentwood-114 (<i>Conceptual Model for Salinity in the Central Valley and Sacramento-San Joaquin Delta</i>, CALFED Bay Delta Program, 2007) • Brentwood-115 (Evaluation of San Joaquin River Flow and Southern Delta Water Quality Objectives and Implementation, <i>Water Supply, Surface Hydrology, and Water Quality</i>, p. 5-44, State Water Resources Control Board, December 2012) • Brentwood-116 (Climate Change, DWR Website, 2015) • Brentwood-117 (Suisun Marsh Program, Memorandum: <i>Salinity Unit Conversion Equations</i>, DWR, K. Guivetchi, 1986) <p><u>DWR's Objection:</u> Lack of foundation and relevance, based on the fact that these exhibits were not authenticated as "true and correct" by any witness testimony.</p>	
<p><u>Testimony Objected to:</u> "Additional details of my opinion...Exhibit Brentwood-102)." (Paulsen Testimony, Brentwood-100, at p. 2:12-14.)</p> <p><u>SLDMWA's Objection:</u> Hearsay.</p>	<p><u>Brentwood Response:</u> This is not hearsay. SLDMWA objects to Dr. Paulsen's statement that additional details of the testimony she is providing are available in Exhibit Brentwood-102. That exhibit is not being used to prove the truth of Dr. Paulsen's testimony, and was prepared by Dr. Paulsen herself.</p>

V. **CONCLUSION**

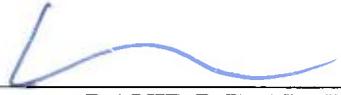
For the reasons outlined herein, and summarized above, the objections filed by SLDMWA and DWR regarding the testimony and exhibits of Dr. Paulsen and Mr. Ehlers should be overruled in their entirety.

DOWNEY BRAND LLP

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DATED: October 19, 2016

DOWNEY BRAND LLP

By: 

DAVID R.E. ALADJEM
Attorney for Protestants
CITY OF BRENTWOOD

STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING

Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s);

CITY OF BRENTWOOD'S RESPONSE TO OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS

to be served by **Electronic Mail (email)** upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated October 6, 2016, posted by the State of Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on October 19, 2016.

Signature: Catharine Irvine

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814